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No. 90-750

In The
Supreme Court Of The United States

OCTOBER TERM, 1990

JOSEPH ZINKER, AS EXECUTOR OF THE ESTATE OF NANCY ZINKER, DECEASED,
Petitioner

v.

J. PAUL DOTY, INDIVIDUALLY AND JUDITH A. KEMP, INDIVIDUALLY,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS

BRIEF OF THE RESPONDENTS IN OPPOSITION

Respondent
J. Paul Doty, Individually

Respondent
Judith A. Kemp, Individually

BY: CLARINE NARDI RIDDLE
ATTORNEY GENERAL

RICHARD J. LYNCH
*HUGH BARBER
Assistant Attorneys General
55 Elm Street
P.O. Box 120
Hartford, CT 06101
Telephone: (203) 566-7334

ROBERT A. NAGY
Assistant Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06101
Telephone: (203) 566-7014

*Counsel of Record

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS

BRIEF OF THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Second Circuit Court of Appeals is reported at 907 F.2d 357.

STATEMENT OF THE CASE

Joseph Zinker, as Executor of the Estate of Nancy Zinker, deceased, has brought a petition for writ of certiorari asking this Court to review the judgment and opinion of the United

States Court of Appeals for the Second Circuit which held that the respondents were entitled to qualified immunity.

On July 6, 1984, Nancy Zinker (hereinafter, the "plaintiff") was notified in writing of her dismissal from state service, effective July 20, 1984, for her violation of agency requirements relating to the accrual and use of compensatory time. The notice of dismissal informed her of her right to contest the dismissal in accordance with the terms of a state statute which provides for a "third level of preliminary review," a formal administrative hearing before an independent Employee Review Board, and for judicial review of the decision of the Employee Review Board. Conn. Gen. Stat. § 5-202. The plaintiff appealed her dismissal to the third level of preliminary review which consisted of an informal hearing where the parties were represented by counsel and witnesses were called. Following the conclusion of the hearing, a decision was issued upholding the plaintiff's dismissal from state service. The plaintiff did not subsequently avail herself of her opportunity to appeal her dismissal to the Employee Review Board. Under Connecticut law, plaintiff's dismissal from state service was not "final" until the plaintiff availed herself of the authorized administrative reviews. The Employee Review Board is specifically authorized to award "appropriate remedial action" including back pay and reinstatement. Conn. Gen. Stat. § 5-202(b).

The plaintiff's complaint was filed in April, 1985, and asserted, in pertinent part, a violation of the procedural due process requirements that were announced by this Court in March, 1985, in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985). Specifically, plaintiff's complaint alleged that, "On July 6, 1984, without adequate notice of the charges against her, explanation of the defendant's evidence, or opportunity to present her side of the story, Plaintiff was terminated from employment."

The factual claims of the parties regarding the predeprivation process that was afforded vary in some respects.

However, plaintiff acknowledged in her trial testimony and in responses to requests for admissions (that the jury was instructed to accept as true) that she met on at least two occasions with her immediate supervisor, the respondent, J. Paul Doty, in June, 1984, to discuss her use of compensatory time. Plaintiff acknowledged that during the first meeting Mr. Doty asked where all the overtime had come from, that she had not submitted records documenting her alleged overtime, that she had never previously taken compensatory time, and that she had not requested prior authorization to take compensatory time. Plaintiff further admitted that during a second meeting with Mr. Doty in June, 1984, she was informed that she could not have worked the alleged overtime at the office as claimed, that she had never been authorized to work overtime in order to accrue compensatory time, and that the matter was considered to be serious and severe disciplinary action was being considered. The plaintiff also admitted that on July 6, 1984, she met with Mr. Doty and the respondent, Judith A. Kemp, an Agency Personnel Officer, who informed her of the employment action, summarized the reason why the action was being taken and handed her the notice of dismissal.

The defendants asserted qualified immunity defenses in their answers and moved for summary judgment asserting that the requirements of due process of law were not clearly established prior to this Court's ruling in *Loudermill*. The District Court denied the defendants' immunity defenses in a ruling dated June 19, 1987. Petitioner's Supp. App., 1A. The District Court subsequently reiterated its prior ruling on defendants' renewed motion for summary judgment which was filed in light of this Court's ruling in *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034 (1987) (requiring the "particular contours" of the right to be clearly established). The trial commenced on May 1, 1989, and the jury was charged with the standard that was enunciated by this Court in *Loudermill*. This enunciation in *Loudermill* occurred some nine months *after* the plaintiff's termination from employment. Judgment was entered on a jury verdict in favor of the

plaintiff for both compensatory damages and punitive damages. The District Court then granted, in part, defendants' Motion for Judgment Notwithstanding the Verdict with respect to the punitive damages, ruling that, "a finding that either of the plaintiff's (sic — defendants) in fact knew, or circumstanced as he was should certainly have known, that he was violating her constitutional rights . . . is unwarranted on the record of this case." Ruling on Motions for Judgment Notwithstanding the Verdict Or For a New Trial, Or For Remittitur, dated October 3, 1989, pp. 5, 6.

The Court of Appeals for the Second Circuit reversed the judgment of the District Court. ruling that the defendants were entitled to their qualified immunity defense. Petitioner's App. 1A, 907 F.2d 357. The plaintiff petitions for a writ of certiorari requesting that this Court review the determination of the Court of Appeals.

ARGUMENT

I. THIS CASE DOES NOT PRESENT ISSUES OF SUFFICIENT IMPORTANCE TO WARRANT THIS COURT'S REVIEW.

The issues presented by the petitioner are not sufficiently important or recurring to warrant this Court's review. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955); *United States v. Abrams*, 344 U.S. 855 (1952).

The issue sought to be reviewed is not one that is likely to recur; therefore, the petition should be denied. The requirements of due process of law applicable to the termination of public employment were not clearly established by this Court until March, 1985, in *Cleveland Board of Education v. Loudermill, supra*. Subsequent to that decision there was litigation in the federal courts, including this action, which raised the question of whether *Loudermill* would be applied retroactively or whether public officials would be entitled to prevail on their qualified immunity defenses. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Those actions, including several cases cited herein, have been finally resolved by the lower courts. Due to the passage of five and one-half years since this Court's decision in *Loudermill*, the issues raised in the petition for certiorari are most unlikely to recur. Accordingly, this Court's review of the decision below would be of limited importance "to the public as distinguished from" the parties involved. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). The petitioner seeks this Court's review of the decision below in order for this Court to determine whether the court below erred in denying the plaintiff monetary relief. This Court does not sit as a court of error reviewing rulings that are of limited importance to the public at large. The petition should be denied.

II. THE RULING OF THE COURT BELOW DOES NOT CONFLICT WITH ANY PRIOR RULING OF THIS COURT.

In *Loudermill* this Court only considered "what pretermination process must be accorded a public employee who can be discharged only for cause." 105 S.Ct. at 1489. The issue of the qualified immunity of officials who acted to terminate public employees prior to the *Loudermill* decision was not presented to, or considered by, the Court. Accordingly, there is no conflict between the decision of the court below in this action and any ruling of this Court that could warrant this Court's discretionary review of the decision of the court below.

At least three distinct issues were addressed in the *Loudermill* decision. First, this Court considered the issue raised by the plurality opinion of the Court in *Arnett v. Kennedy*, 416 U.S. 134 (1974), namely whether the procedural requirements applicable to the termination of a property interest may be limited by the statute that creates the underlying substantive right. Second, whether due process of law requires "some kind of hearing" prior to the initial deprivation of employment, notwithstanding that the employment action may not be "final" under state law until post-deprivation procedures capable of awarding back pay and reinstatement are concluded. Third, the decision established the specific requirements of due process of law that must be provided prior to the initial deprivation of employment when a full post-termination adversarial hearing is available. The defendants maintained throughout this litigation that each of these three issues was sufficiently unclear prior to *Loudermill* so as to entitle them to prevail on their qualified immunity defenses.

On the first two issues considered in *Loudermill*, this Court supported its ruling, in part, by reference to prior decisions of the Court. In doing so, however, the Court was only fulfilling its responsibility to articulate the rationale for its decision, including the consistency of the ruling with prior

decisions of the Court. Nowhere, however, did the *Loudermill* Court consider whether the issues were clearly established for qualified immunity purposes as the immunity issue was not before the Court. Furthermore, the Court's decision contains language that would support a grant of qualified immunity even if the immunity issue had been considered by the Court. For example, on the "bitter with the sweet issue" raised by the plurality opinion of this Court in *Arnett,* the opinion of the Court in *Loudermill* noted that both the District Court and a dissenting Judge on a divided panel of the Court of Appeals for the Sixth Circuit found that procedural requirements could be limited by the statute creating the substantive right. 105 S.Ct. at 1490, 1491. This Court further acknowledged that the "bitter with sweet" theory "has at times seemed to gather some support," citing to *Bishop v. Wood,* 426 U.S. 341, 355-361 (White, J. dissenting) and *Goss v. Lopez,* 419 U.S. 565, 586-87 (Powell, Burger, Blackmun and Rhenquist dissenting) as evidencing support for the theory. 105 S.Ct. at 1492. Finally, this Court acknowledged that "[i]f a clearer holding is needed, we provide it today." 105 S.Ct. at 1493.

As is clear from the ruling of the Second Circuit Court of Appeals in this case, it was far from clear to the lower courts and to legal commentators that prior rulings of this Court had rejected the "bitter with the sweet" approach of the *Arnett* plurality or had required "some kind of hearing" prior to the initial deprivation of employment. The court below properly concluded that, "a review of the record on file in the Supreme Court makes it quite clear that the *Loudermill* Court was not being asked to simply reiterate 'clearly established law.' " Petitioner's App. 10A, 907 F.2d at 361. In support of that conclusion the court below reviewed the ruling of the lower courts in *Loudermill* and its companion case, *Donnelly v. Parma Board of Education,* the writs of certiorari in those actions, and the *amici* briefs of the states (including Connecticut) in support of the grant of certiorari and on the petition for certiorari. Petitioner's App. 10A-14A, 907 F.2d at 360-62. The court below also cited more than forty

decisions that demonstrate uncertainty in the requirements of due process of law applicable to the termination of public employment, including decisions of this Court, the Court of Appeals (including prior decisions of the Second Circuit), the district courts (including decisions of the local district court) and the Connecticut state courts. Petitioner's App. 12A–14A, 907 F.2d at 362–63. Furthermore, four law review commentators were cited in support of the conclusion that the law was not "clearly established" prior to *Loudermill*. Petitioner's App. 15A–16A, 907 F.2d at 363.

On the issue of the particular contours of the required pre-termination hearing, the *Loudermill* Court clearly articulated, for the *first* time, the requirements of due process of law. A year earlier this Court had indicated that, "'But the Court had not determined what kind of hearing must be provided . . . there had been no occasion to specify any minimally acceptable procedures for termination of employment." *Davis v. Scherer*, 468 U.S. 183, 192, n.10, 104 S.Ct. 3017, 3018, n.10. It was not until *Loudermill* that the Supreme Court held that "the tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." 105 S.Ct. at 1495. Plaintiff's complaint alleged, and the jury was charged, with the precise formulation for the requirements of due process that was enunciated by this Court in *Loudermill* — some nine months *after* the plaintiff's termination from employment.

Anderson v. Creighton, supra, provides that in order for the qualified immunity defense to be lost, the right "must have been clearly established in a more particular and hence more relevant sense. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." 107 S.Ct. at 3039. On this issue, there is *no* claim of conflict with the prior decisions of this Court because the particular contours of the right were clearly established for the first time in *Loudermill*. Accordingly, the defendants were entitled to prevail on

their immunity defense and there clearly is no conflict with any prior decision of this Court that would warrant this Court's consideration.

III. THERE IS NO DIRECT CONFLICT BETWEEN THE DECISIONS OF THE COURTS OF APPEAL SINCE THE DIFFERENT RESULTS ACHIEVED ARE ATTRIBUTABLE TO THE PARTICULAR FACTS OF EACH CASE AND TO THE PRE-EXISTING LAW WITHIN THE CIRCUIT.

The results in this case, and the Fourth Circuit decision of *Buschi v. Kirven*, 775 F.2d 1240 (4th Cir. 1985), differ from the results achieved by the Fifth and Eighth Circuits in *Page v. DeLuane*, 837 F.2d 233 (5th Cir. 1988), and *Perry v. Brakke*, 826 F.2d 740 (8th Cir. 1987). However, the different results are attributable to the particular facts of each case and the pre-existing law within each circuit. It is not attributable to a conflict between the circuits as to whether prior decisions of this Court had "clearly established" the requirements of due process of law.

The fact that there is no direct conflict between the circuits is best illustrated by the Fifth Circuit decisions of *Page v. DeLuane* and *Price v. Brittain*, 874 F.2d 252 (5th Cir. 1989). In *Price* the Fifth Circuit distinguished and limited *Page* by considering it a factual situation where no pre-deprivation process of any kind had been afforded. The Court indicated that, "the rule in *this* circuit prior to *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) and *Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984), required that there be some form of hearing before an employee was deprived of a constitutionally-protected property interest in his employment." 874 F.2d at 260, 261 (emphasis added). However, the Fifth Circuit acknowledged that the prior rulings of the Circuit did not answer "the more difficult questions of how much notice and opportunity are required," 874 F.2d at 261 n.15, and granted

immunity based upon the fact of a "precipitously-called 'conference.' "

By contrast, controlling law in the Second Circuit and in the local district did not require any kind of pre-deprivation hearing when the employment action was not final under state law until post-deprivation procedures capable of awarding reinstatement and back pay were afforded. *Newman v. Bd. of Education of City School District of N.Y.*, 594 F.2d 299 (2d Cir. 1979); *Buck v. Bd. of Education of City of New York*, 553 F.2d 315 (2d Cir. 1977); *Sessions v. State of Connecticut*, 293 F.Supp. 834 (D.Conn. 1968), *aff'd*, 404 F.2d 342 (2d Cir. 1968). Furthermore, the pre-deprivation process that was afforded in this action, even based upon plaintiff's own account of events, at least equals the "precipitously held 'conference' " that was sufficient to invoke immunity in *Price*. Therefore, even the Fifth Circuit would grant immunity under the facts of this case. *Price v. Brittain, supra*. Accordingly, there is no conflict between the Second and Fifth Circuits. The circuits vary only to the extent that the law of each circuit recognized a right to some kind of pre-deprivation hearing — with controlling Second Circuit authority clearly supporting the grant of immunity in this case.

Similarly, in *Peery v. Brakke, supra*, the Eighth Circuit denied the qualified immunity defense, ruling that "at the time Peery was fired, the due process standard later specifically set out in *Loudermill* was a 'clearly established' constitutional standard of which a reasonable person would have known." 826 F.2d at 744, quoting *Harlow v. Fitzgerald*, 457 U.S. at 818. The Eighth Circuit in *Peery*, however, failed to consider factors that were relevant to the grant of immunity by the Second Circuit in this action, by the Fourth Circuit in *Buschi v. Kirven, supra*, and by the Fifth Circuit in *Price v. Brittain, supra*. *Peery*, for example, did not consider controlling law within the circuit on the requirements of due process of law applicable to the termination of public employ-

ment — which factor was relevant to the courts determination in this action, in *Price* and in *Buschi*.[1] The *Peery* Court only considered the second issue addressed in this Court in *Loudermill* — whether "some kind of hearing" was required as a matter of due process of law. The *Peery* Court did not consider the terms of the South Dakota state statute and the continued validity of the *Arnett* plurality opinion of the Court.

By contrast, the court below based its holding, in substantial part, on its finding that this Court had not clearly rejected the "bitter with the sweet" approach of the *Arnett* until *Loudermill*, ruling that "with respect to those states which, like Connecticut and Ohio, had established statutory procedures governing the dismissal of classified employees, the requirements of federal due process were not clearly established prior to *Loudermill*." Petitioner's App. 16A, 907 F.2d at 363.

Accordingly, the different results in these actions are explained by the different factors and issues that the circuits considered. A direct conflict in the application of legal principles is not present.

IV. THIS CASE DOES NOT PRESENT AN IMPORTANT QUESTION OF LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This action does not present an important question of law which has not been, but should be, settled by this Court, namely whether immunity decisions should be evaluated by reference to the opinions of this Court, of the courts of appeal, or of the local district court. *Harlow v. Fitzgerald*, 457 U.S.

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[1] In *Buschi*, the Fourth Circuit upheld a claim for qualified immunity, ruling that "it is beyond dispute that at the time of these discharges, which predated the decision in *Loudermill*, the law in this Circuit was plainly understood not to require a pre-termination hearing." 775 F.2d at 1256.

at 818 n.32. See, *Procunier v. Navarette*, 434 U.S. 555, 565 (1978).

The issue left open by *Harlow* and *Procunier* is whether a decision of this Court is required in order for the law to be clearly established and the qualified immunity defense to be lost. This Court indicated in *Procunier* that there was no occasion to address that unresolved issue when controlling lower court authority supported the grant of immunity, ruling that "whether the state of the law is evaluated by reference to the opinions of this Court, or the Court of Appeals or by the local District Court, there was no 'clearly established right' " so that "there is thus no occasion to address this case on the assumption that *Navarette* mailing privileges were protected by a constitutional rule of which petitioners could reasonably have been expected to be aware. . . ." *Procunier v. Navarette, supra*, p. 565, n.13. Similarly, this action does not present the question left open by *Harlow* and *Navarette* since the lower court properly found that the prior decisions of the Second Circuit, *Newman v. Bd. of Education of City School District of New York, supra; Buck v. Bd. of Education of City of New York, supra*, and of this local district, *Sessions v. State of Connecticut, supra*, squarely support the grant of qualified immunity in this case.

CONCLUSION

The court below properly identified the standard applicable to qualified immunity questions as enunciated by *Harlow* and refined by subsequent decisions of this Court, including *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (immunity protects "all but the plainly incompetent or those who knowingly violate the law"), and *Anderson v. Creighton*, 483 U.S. at 640. ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.") Petitioner's App. 7A, 907 F.2d at 359. The petitioner acknowledges that the court below demonstrated uncertainty in the lower courts; however, petitioner asserts that the defendants should be retroactively held to the standard enunciated in *Loudermill*. Petitioner's position is squarely inconsistent with standards established by this Court in *Harlow*, *Malley v. Briggs*, and *Anderson v. Creighton*, and does not present an important question for this Court's determination. If the lower courts were uncertain, it cannot be objectively clear that the respondents must have understood that their conduct violated plaintiff's rights.

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

RESPONDENTS

BY: CLARINE NARDI RIDDLE
ATTORNEY GENERAL

RICHARD J. LYNCH
Assistant Attorney General

HUGH BARBER
ROBERT A. NAGY
Assistant Attorneys General
P.O. Box 120
Hartford, CT 06101
Tel: (203) 566-7334